

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

JEFFERY JOHNSON,)	
)	
Plaintiff,)	
)	
vs.)	CIV-13-177-D
)	
STATE OF OKLAHOMA, et al.,)	
)	
Defendants.)	

REPORT AND RECOMMENDATION

Plaintiff, a state prisoner appearing *pro se* and *in forma pauperis*, filed this action pursuant to 42 U.S.C. §1983 on February 19, 2013. The matter was referred to the undersigned Magistrate Judge by United States District Judge DeGiusti on February 20, 2013, for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). For the reasons set forth herein, it is recommended that the cause of action be dismissed without prejudice due to Plaintiff's failure to pay the initial partial filing fee.

With his Complaint, Plaintiff filed a Motion for Leave to Proceed *In Forma Pauperis* in conformance with 28 U.S.C. §1915(a) as amended. After review of Plaintiff's motion on February 26, 2013, the undersigned granted Plaintiff's motion to proceed without full prepayment of the filing fee and directed Plaintiff to pay an initial partial filing fee of \$8.13 by March 18, 2013, in accordance with 28 U.S.C. §1915(b)(1). Plaintiff was advised that

he would be required to make monthly payments of 20 percent of the preceding month's income credited to his prison account(s) until the full \$350 filing fee was paid. He was also advised that failure to either (1) pay the initial partial filing fee, or (2) show cause in writing for his failure to do so could result in dismissal of this action without prejudice to refile. On March 8, 2013, Plaintiff filed letters (Docs. #7 & 8) that were construed as a request for an extension of time to pay initial partial filing fee. On March 12, 2013, the undersigned granted Plaintiff an extension of time until April 1, 2013 to comply with the Order entered February 26, 2013 (Doc. #5). As of this date, the Court's records show that Plaintiff has failed to either pay the initial partial filing fee, show cause in writing why he is unable to do so, or request a further extension of time within which to pay the required initial partial filing fee. Because of Plaintiff's failure to pay the required initial partial filing fee and the expiration of the time given Plaintiff to make such payment, the action should be dismissed without prejudice to refile. LCvR 3.4(a); Freeman v. Colo. Dep't of Corrections, 396 Fed.Appx. 543, 2010 WL 3818077 (10th Cir. Oct. 1, 2010) (affirming dismissal without prejudice of §1983 action for failure to pay initial partial filing fee)(unpublished op.); Barnett v. Ray, 320 Fed. Appx. 823, 2009 WL 821419 (10th Cir. Mar. 31, 2009)(unpublished op.)(same).

RECOMMENDATION

Accordingly, it is recommended that Plaintiff's cause of action be dismissed without prejudice to refile for failure to pay the initial partial filing fee or to show cause for his failure to do so. Plaintiff is advised of his right to file an objection to this Report and

Recommendation with the Clerk of this Court by April 24th, 2013, in accordance with 28 U.S.C. §636 and LCvR 72.1. Plaintiff is further advised that failure to make timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991); cf. Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996)(“Issues raised for the first time in objections to the magistrate judge’s recommendations are deemed waived.”).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not specifically addressed herein is denied.

ENTERED this 4th day of April, 2013.


GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE